murder convictions. As part of his petition for post-conviction relief, and later in opposing the state's motion for summary judgment on the petition, Richey requested that the state court permit him to take discovery and that it hold an evidentiary hearing. The state court refused both requests, and denied Richey's petition. The state court of appeals affirmed the denial on the merits, and the Ohio Supreme Court denied jurisdiction.

D. *Both the State and Richey Presented New Evidence to the District Court, which Agreed that Richey Had Undermined the State's Evidence.*

Richey then filed his petition for a writ of habeas corpus. Before the United States District Court for the Northern District of Ohio, Richey again sought discovery in part to support his claim of ineffective assistance of counsel. At the same time, the state sought to take further discovery. The district court allowed both motions. The state argued neither that such discovery was inappropriate nor that AEDPA prevented the court from reviewing evidence obtained in discovery. After completion of discovery, Richey requested an evidentiary hearing; the district court denied the request, but ordered that the record be expanded to include all of the discovery taken, including the depositions of Armstrong, Custer, DuBois, Richey's trial counsel, and others. Both Richey and the state expanded the record before the district court by filing extensive materials obtained through discovery.

On the record, the district court denied Richey's petition. Nevertheless, as part of its lengthy opinion, the district court agreed that Richey's new scientific evidence had substantially undermined the evidence presented by the state at trial to support the conclusion that the fire started as a result of arson. The district court noted both that "the new factual evidence presented to the Court undermines some of the state's trial theory regarding arson," App. 119a, and that "[t]aken

cumulatively, the new evidence supplied during discovery in this case does undermine the scientific findings presented at trial." App. 124a.

E. *The Sixth Circuit Carefully Analyzed Two of Richey's Eleven Constitutional Claims and Granted the Conditional Writ of Habeas Corpus on Both Grounds.*

When Richey appealed that denial, the district court and the Sixth Circuit Court of Appeals granted a certificate of appealability on eleven separate grounds, directed to both his conviction and his sentence. The Sixth Circuit heard argument on May 7, 2003 and issued its decision on January 25, 2005. Analyzing two of Richey's eleven claims, the panel ruled that a conditional writ of habeas corpus should issue on both grounds – (1) the state had failed to prove beyond a reasonable doubt each element of aggravated felony murder, O.R.C. § 2903.01(B), and (2) Richey had received ineffective assistance of counsel, focused on the failure of Richey's trial attorney to retain and work adequately with a competent and qualified expert witness. The Sixth Circuit concluded that "constitutional errors have undermined our confidence in the reliability of Richey's conviction and sentence," App. 2a, and so "[t]he district court's judgment is REVERSED, and the case is REMANDED with instructions that a conditional writ of habeas corpus, giving the State of Ohio ninety days to attempt to retry Richey or release him from custody, be GRANTED." App. 49a-50a. The state sought rehearing and rehearing en banc; these requests were denied on April 15, 2005, with no active judge of the Sixth Circuit even requesting a vote on the request for rehearing en banc. *See* App. 60a-61a.

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit Analyzed the Sufficiency of the Evidence Question as Directed by this Court's Precedent and in the Same Way as the Other Circuits.

The Sixth Circuit's interpretation of a long-since amended statute does not present a reason for granting certiorari. Richey was convicted of aggravated felony murder based on a theory of transferred intent. Yet Ohio's aggravated felony murder statute, at the time of Richey's conviction, contained clear language requiring proof of intent to cause the death of the person killed. Up to the time of Richey's direct appeal to the Ohio Supreme Court, no Ohio case had held that a transferred intent theory was available under the aggravated felony murder statute, and dicta in Ohio appellate cases suggested that the transferred intent theory was not available. Therefore, during post-conviction Richey argued that the state had failed to prove an element of the offense, and after a close reading of the statute and case law the Sixth Circuit agreed.

The state's main counter lies in the Ohio Supreme Court's opinion on Richey's direct appeal. Though Richey's counsel did not argue at trial or on direct appeal that he could not be convicted under the statute on a theory of transferred intent, the Ohio Supreme Court's opinion included a gratuitous and ambiguous passage about transferred intent being an available theory under a different murder statute: murder by prior calculation and design. The state argues that, even though this passage does not cite the aggravated felony murder statute, the passage means that the Ohio court approved the use of the transferred intent theory in Richey's case. The Sixth Circuit, however, pulled the teeth out of this argument in two ways. First, it certified the relevant state law questions to the Ohio Supreme Court–questions that the Ohio court refused to answer. Second, it pointed out that even if the state were reading the direct appeal opinion correctly, the new reading of the statute

would have been so unexpected in light of the statutory language and the existing caselaw as to violate due process.

By its petition, the state is asking this Court to become mired in the interpretation of a long-since amended Ohio statute and in the application of that statute to the particulars of Richey's case. Moreover, the state is asking this Court to interpret the highly ambiguous language of the Ohio Supreme Court, on which nearly all of the state's arguments depend. But none of this is necessary. The Sixth Circuit's opinion is a paradigm of careful reading. It follows the model of this Court's precedents on sufficiency of the evidence, and it shows exemplary respect for Ohio courts and Ohio law. And there is certainly no reason for this Court to try to divine what the Ohio Supreme Court may have meant by the passage on transferred intent in its opinion on direct appeal. The Ohio court had the opportunity to speak for itself upon certification and chose to remain silent. This Court should not join the fray.

A. *The Sixth Circuit's Primary Analysis Was Consistent with Decisions of this Court and Other Circuits.*

The state claims that the Sixth Circuit's decision on the state's failure to prove aggravated felony murder beyond a reasonable doubt "creates a sharp break both with authority from this Court and the uniform opinion of four other circuits," Pet. Cert. 13; the state even argues that "summary reversal may well be appropriate." Pet. Cert. 14. The state's overheated rhetoric is insupportable. Without question a federal constitutional claim is stated when a state convicts a defendant without proof beyond a reasonable doubt of each element of the crime. *Jackson v. Virginia*, 443 U.S. 307, 321 (1979); *In re Winship*, 397 U.S. 358, 364 (1970). To decide such a claim, a federal court must necessarily look to state law, as it applied to the accused, to determine the elements of the crime. Only after those elements are determined can the federal court analyze the constitutional question whether

adequate evidence to convict was presented. The Sixth Circuit's careful, logical, and comprehensive analysis of Ohio's aggravated felony murder statute in the unique circumstances of Richey's case is wholly consistent with the decisions and analytical method of both this Court and the other circuits.

Richey was charged with and convicted of only one capital crime: aggravated felony murder under O.R.C. § 2903.01(B) and (D). Although the state never presents the statutory text to this Court, the language applicable to Richey's conviction was as follows:

> No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

§ 2903.01(B) (1981) (App. 359a). This section of the homicide statute was modified by section (D), which states that proof of intent to "cause the death of another" is not sufficient for aggravated felony murder-the state had to prove beyond a reasonable doubt that the defendant "specifically intended to cause the death of the person killed."

> No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. . . . If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section . . . the jury . . . is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person ***specifically intended to cause***

> ***the death of the person killed***, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

§ 2903.01(D) (1981) (emphasis added) (App. 359a-360a). This latter language was amended out of the statute in 1998, but Richey's case fit the language perfectly. The state tried Richey solely on a transferred intent theory and conceded that Richey did not intend to cause the death of Cynthia Collins, the person killed. Thus, so long as the statutory language meant what it said, the state did not prove one of the elements of aggravated felony murder in Richey's case.

In this context, the Sixth Circuit's analysis was straightforward and unremarkable. The Sixth Circuit looked to state law to determine the elements of the crime.[1] First, the Sixth Circuit noted that "the Ohio Supreme Court is the ultimate arbiter of the State's law" and "this Court cannot decide what Ohio law should be . . . ." App. 30a. Indeed, the Sixth Circuit attempted to certify the question of the elements of Ohio law to the Ohio Supreme Court, as this Court did in *Fiore v. White*, 531 U.S. 225, 228 (2000), *see* App. 28a, n. 6,

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[1] The state does not argue that the Sixth Circuit failed to give appropriate deference to a state court decision on the merits on this issue because the state argued, and Richey conceded, that this ground was not raised during Richey's direct appeal. Rather, the Sixth Circuit concluded that cause and prejudice (arising from the failure of Richey's counsel to raise this argument) permitted Richey to avoid the procedural default. The state does not ask this Court to revisit that conclusion.

but the Ohio Supreme Court declined to answer the question.[2] Lacking any new guidance from the Ohio court, the Sixth Circuit then turned to the primary source of Ohio law – the statute itself, and Ohio cases interpreting it.

Beginning its analysis with the statutory language quoted above, App. 18a-19a, the court of appeals recognized that the plain meaning was to require proof of specific intent to cause the death of the person killed. App. 19a.[3] Next, acknowledging that court decisions can also shed light on an issue of statutory interpretation, the Sixth Circuit turned to decisions of the Ohio courts analyzing the aggravated felony murder statute. The Sixth Circuit first noted that the Ohio courts had repeatedly interpreted subsection (D) as informing the intent requirement of subsection (B). *See* App. 19a-20a

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[2] Contrary to the suggestion of the state, *see* Pet. Cert. 11 n.1, this Court should not read the refusal of the Ohio Supreme Court as indicating that the state court had already resolved this issue on Richey's direct appeal. Rather, the panel's lengthy certification order (*see* App. 220a-231a) clearly portended the court's ultimate conclusion that Ohio law required proof of intent to kill the person killed for aggravated felony murder. While it is likely inappropriate to read any conclusion from the state court's silence and refusal to answer the certified question, on the record presented in this case it is undoubtedly incorrect to assume the state supreme court refused to answer the question because it disagreed with the Sixth Circuit's clearly foreshadowed interpretation.

[3] Before other courts, the state has attempted to explain the statutory language by presenting an argument that O.R.C. § 2903.01(D) applies only to jury trials and that, since Richey's case was jury-waived, it does not apply. App. 20a-21a. The Sixth Circuit rightly rejected this argument out of hand, noting both that it would be unconstitutionally irrational to have different elements of the same crime before different finders of fact and that, even if this were permissible, it would have been ineffective assistance of counsel per se to waive a jury in that situation. *Id.* The state chooses to ignore the statutory language before this Court, rather than repeat such strained arguments.

(citing Ohio cases). The court then turned to "all the cases that directly touch upon" the issue of transferred intent. App. 24a. Citing both *State v. Sowell* and *State v. Mullins*, the court concluded that "[t]he preceding state case law - and it is the only Ohio case law at the time that squarely addressed this issue - indicates that transferred intent does not apply to subsection D of the aggravated felony murder statute." App. 25a. The court therefore concluded that "we are compelled to adhere to Ohio's specific pronouncements at the time of Richey's conviction and state appeals." App. 25a. On this basis, the Sixth Circuit concluded that the aggravated felony murder statute, as applied to Richey, did not permit a transferred intent theory and did require proof that Richey intended to kill Cynthia Collins, even though the state had conceded he had no such intent. It followed that the petition for habeas corpus should be granted insofar as Richey's conviction for aggravated felony murder was based on a failure to prove an element of the offense beyond a reasonable doubt.

Nothing in the Sixth Circuit's analysis of aggravated felony murder is the least bit out of the ordinary or inconsistent with the holdings of this Court. The Sixth Circuit looked to state law to determine the elements of the crime under the version of the statute applicable at the time of Richey's conviction. This Court itself has repeatedly done the same. *See Fiore v. White*, 532 U.S. at 228-29; *Jackson v. Virginia*, 443 U.S. at 324-25; *In re Winship*, 397 U.S. at 359-60. The Sixth Circuit sought the Ohio Supreme Court's guidance in interpreting the aggravated felony murder statute- a procedure endorsed in *Fiore*. After the Ohio Supreme Court declined to answer, the Sixth Circuit had no choice but to seek guidance, as this Court and other circuits have, in other traditional sources of state law: statutory text and state cases interpreting that statute at the time of the conviction. *See, e.g., Einaugler v. Supreme Court*, 109 F.3d 836, 840-42 (2d Cir. 1997); *Fenske v. Thalacker*, 60 F.3d 478, 480 (8th Cir. 1995).

B. *In Richey's Direct Appeal, the Ohio Supreme Court Did Not Decide that Transferred Intent is a Permissible Theory of Aggravated Felony Murder.*

In the petition, the state's main answer to Richey's challenge to the sufficiency of the evidence is that in Richey's direct appeal the Ohio Supreme Court held that transferred intent was a sufficient basis for Richey's conviction for aggravated felony murder. Although the state acknowledges that Richey did not argue on direct appeal that transferred intent was not a permissible theory, *see* Pet. Cert. 8, the state relies upon the following ambiguous passage from the Ohio Supreme Court decision:

> The fact that the intended victim escaped harm, and that an innocent child, Cynthia Collins, was killed instead, does not alter Richey's legal and moral responsibility. "The doctrine of transferred intent is firmly rooted in Ohio law." *State v. Sowell*, 39 Ohio St.3d 322, 332. Very simply, "the culpability of a scheme designed to implement the calculated decision to kill is not altered by the fact that the scheme is directed at someone other than the actual victim." *State v. Solomon* (1981), 66 Ohio St.2d 214, 218.

Pet. Cert. 8-9 (quoting App. 250a). But the state ignores that Richey was charged with, tried for, and convicted of aggravated felony murder under O.R.C. § 2903.01(B), not murder by "prior calculation and design" under O.R.C. § 2903.01(A). Both cases cited, *Sowell* and *Solomon*, addressed convictions under O.R.C. § 2903.01(A). The language of the Ohio Supreme Court, about "a scheme designed to implement the calculated decision to kill," hearkens to subsection (A): "No person shall purposely, and with prior calculation and design, cause the death of another." O.R.C. § 2903.01(A) (1981) (App. 359a). And in *Sowell* the Ohio Supreme Court distinguished subsections (A) and (B), affirming the

transferred intent conviction under subsection (A) while noting in dictum that such a conviction would not obtain under subsection (B). Thus, in rejecting Sowell's argument that the addition of O.R.C. § 2903.01(D) in 1981 eliminated the application of transferred intent in subsection (A) cases, the Ohio Supreme Court stated:

> Subsection (D) of R.C. 2903.01 deals specifically with subsection (B) of that statute, which defines the offense known as "felony murder." It does not affect R.C. 2903.01(A), which is involved in the case at bar, or our holding in *State v. Solomon*.

State v. Sowell, 530 N.E.2d 1294, 1305 (Ohio 1988). As the Sixth Circuit observed, the plain meaning of this passage is that subsection (D) *does* eliminate transferred intent for a charge under subsection (B).

The Sixth Circuit was correct to conclude that the Ohio Supreme Court in Richey's direct appeal did not sanction the use of a transferred intent theory to prove aggravated felony murder. At the time of the direct appeal, Richey's appellate counsel had not argued for this distinction between subsection (A) and subsection (B). In fact, the issue had not come up at all. In that context, the Ohio Supreme Court's throwaway reference to transferred intent in Richey's direct appeal, supported only by cases under subsection (A), and made without any reference to subsection (B), should not be read as an interpretation of subsection (B).

In short, the Ohio Supreme Court did not decide the transferred intent issue in Richey's direct appeal, which means that no case had squarely decided the issue. And this left the Sixth Circuit to look to the statutory language and to cases such as *Sowell* and *Mullins* to define the elements of aggravated felony murder. The Sixth Circuit's effort to understand that language and those cases is a model of care and close reading.

Although the state tries to suggest otherwise, none of the circuit cases identified by the state are in conflict with the Sixth Circuit's methodology. Surely none hold that, whenever a state appellate court has affirmed the conviction on direct appeal, there is no need to determine what state law defines as the elements of the crime. Instead the circuit cases simply hold that in identifying those elements a federal court should look to state statutory language and state court decisions, sometimes including a decision in the petitioner's own case.[4]

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[4] In the state's lead case, the unreported Seventh Circuit decision in *Gilreath v. Hanks*, No. 95-1972, 1996 U.S. App. LEXIS 20340 (7th Cir. 1996), the court did not simply rely upon the state court affirmance of the defendant's conviction to hold that transferred intent was a permissible theory to support a conviction. Rather, the Seventh Circuit cited both the relevant statute and case law in concluding that "[t]he Indiana Supreme Court recognizes the doctrine of transferred intent." *See also Einaugler v. Supreme Court*, 109 F.3d 836, 840-42 (2d Cir. 1997) (citing New York statute and case law in addressing claim that constitutionally insufficient evidence had been presented); *Fenske v. Thalacker*, 60 F.3d 478, 480 (8th Cir. 1995) (same, citing Iowa statute and case law). In other cases cited by the state, the circuits stated that the state supreme court, on direct appeal, had explicitly reached the opposite conclusion to that requested by the petitioner in the direct appeal on a pure question of state law. *Bates v. McCaughtry*, 934 F.2d 99, 101 (7th Cir. 1991) (noting that issue had been explicitly raised and decided during direct appeal); *Jeffries v. Blodgett*, 5 F.3d 1180, 1194 (9th Cir. 1993) (noting that issue was directly addressed and resolved by state court on direct appeal). In those cases, the petitioner did not even argue that the state court had not resolved the issue, nor that the resolution of that issue by the state court raised any new interpretation. Rather, the petitioners simply sought reconsideration by the federal court of the state court's state law conclusions. The federal courts of appeal, not surprisingly, refused to reconsider those decisions. Still other cases cited by the state address the separate situation where state law requirements are well-established and the question is whether the state's law is unconstitutional. *See, e.g., Eaglin v. Welborn*, 57 F.3d 496 (7th Cir. 1995) (en banc) (addressing whether it is permissible to allow a defendant to raise affirmative defense of entrapment only if he admits to fact of committing accused acts).

And that principle supports the state's position if, and only if, the state is correct on two fundamental contentions: (1) the Ohio Supreme Court in Richey's direct appeal did clearly decide that transferred intent sufficed in an aggravated felony murder case and (2) despite statutory language and caselaw pointing to the contrary interpretation, the Ohio Supreme Court could apply this new decision about transferred intent to Richey without violating due process. To resolve these two issues, this Court will necessarily have to involve itself deeply in interpreting the now-repealed language of subsection (D), the relevant Ohio cases predating Richey's direct appeal, and the ambiguous language of the Ohio Supreme Court's opinion on direct appeal. Only after pursuing these inquiries–all of which are unique to Richey's case–will this Court be able to determine whether the petitioner or the Sixth Circuit is correct in its reading of the then-applicable Ohio law. In short, Richey's case presents no split in the circuits about doctrinal principles, but merely the possibility of a disagreement between the state and the court of appeals about the proper interpretation of state law and its proper application to Richey.

One of the circuit cases cited by the state is particularly instructive. In *Davis v. Strack*, 270 F.3d 111 (2d Cir. 2001), the Second Circuit considered whether a jury charge of "justification" was required under New York law and, therefore, whether the failure to give the charge resulted in a violation of the defendant's due process rights. The issue was raised, and rejected, in the New York courts during the direct appeal. *Id.* at 120-21. Despite this resolution, the Second Circuit revisited the conclusion and granted the habeas petition. The Second Circuit reviewed the New York statute, *id.* at 124, and then the relevant case law interpreting the statute. *Id.* at 124-25. Applying this law to the facts of the case, the Second Circuit concluded that the New York courts reached an incorrect conclusion: "The Appellate Division

unreasonably rejected Davis's due process challenge. On the basis of the evidence presented, Davis had a clear right under New York law to have the jury consider his defense, and the trial in which he was denied that right was egregiously at odds with the standards of due process propounded by the Supreme Court in *Cupp*." *Id.* at 133 (citing *Cupp v. Naughten*, 414 U.S. 141 (1973)). The Second Circuit thus went much further than did the Sixth Circuit here, granting a petition for a writ of habeas corpus on a question that was actually raised, and addressed, by the state courts on the merits. Far from creating a circuit "split," the Sixth Circuit's careful approach to state law in *Richey* was wholly consistent with the decisions of other circuits – including those cited by the state.

C. *The Sixth Circuit Performed an Alternate Analysis to Reject the State's Argument that the Ohio Supreme Court on Richey's Direct Appeal Approved Use of Transferred Intent to Prove Aggravated Felony Murder.*

The Sixth Circuit also performed an alternative analysis which assumed that the state was correct and transferred intent was a permissible theory. The Sixth Circuit concluded that, given the statutory language and the case law applicable to Richey, any conclusion that transferred intent *was* permissible would violate Richey's due process rights.

> [B]ecause there was not a single judicial pronouncement suggesting that transferred intent could be used under subsection D, and because the prior case law affirmatively indicates to the contrary, the Ohio Supreme Court would have raised a federal constitutional concern of impermissible retroactivity, had it authoritatively read transferred intent into subsection D. Therefore, if we accept the State's interpretation of the Ohio Supreme Court's opinion as having done this, it would have been a retroactive

> or novel application of a statute which would have violated Richey's clearly established rights under the Due Process Clause.

App. 30a. In the petition, the state acknowledges the validity of the Sixth Circuit's legal theory: "a state court's determination of the elements could potentially be so novel or unexpected that it would violate a defendant's due process rights." Pet. Cert. 17-18 (citing *Bouie v. City of Columbia*, 378 U.S. 347, 249-50 [sic] (1964)). And the state barely challenges the Sixth Circuit's conclusion. *See* Pet. Cert. 19-20. The state tries to suggest that the Sixth Circuit did not mean to make a true alternative holding–though the language quoted above gives the lie to the state's suggestion. The state also tries to suggest that the absence of an Ohio Supreme Court case *holding* that subsection (B) forbade a transferred intent theory defeats any claim based on a retroactive or novel application. But no precedent suggests that a novel interpretation of a statute can violate due process only if the state's highest court previously held for the contrary interpretation. Surely a new or retroactive interpretation can violate legitimate expectations created by statutory language and persuasive case law. Thus, the Sixth Circuit's alternate holding is a further reason why the transferred intent language in the opinion on Richey's direct appeal should have had no impact on the outcome of Richey's habeas petition.

II. The Sixth Circuit Gave Appropriate Deference to the State Court Decision in Analyzing the Claim of Ineffective Assistance of Counsel.

The Sixth Circuit's decision evidences the appropriate deference to a state court decision. In arguing that the Sixth Circuit failed to give appropriate deference to the state court's decision, the state would apparently require some particular method or formula be followed by the courts of appeal. But this Court has never required a particular procedure or the

recitation of certain key words to demonstrate deference. Moreover, even if a particular formula were required, it would look just like the Sixth Circuit's decision here – a recitation of the appropriate standard, a citation to the state court decision, analysis, and a conclusion that the state court's decision to the contrary was unreasonable. As the Sixth Circuit provided just such an analysis, there is no basis for this Court to grant the petition for a writ of certiorari.

The Sixth Circuit deferred to the final state court decision on the question of ineffective assistance of counsel.[5] The Sixth Circuit began its decision with a recitation of the appropriate legal standard for habeas review.

> We apply the familiar habeas rules. Because Richey's petition was filed after April 24, 1996, it falls under the restrictions imposed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *Lindh v. Murphy*, 521 U.S. 320, 326 (1997). AEDPA requires that we respect any determination made by the state court unless it: (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. §§ 2254(d)(1)-(2); *see also Williams v. Taylor*, 529 U.S. 362 (2000).

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[5] In the Petition, the state appears to seek deference to the lower court decision. The state cites the trial court's denial of state post-conviction relief, *see* Pet. Cert. 22 (citing App. 350a), even though the state court of appeals later addressed this issue on the merits. *See* App. 336a-342a. Under AEDPA, deference is properly given to the decision of the state's highest court to address the question on the merits. *See, e.g., Lewis v. Lewis*, 321 F.3d 824, 829 (9th Cir. 2003); *Schultz v. Page*, 313 F.3d 1010, 1015 (7th Cir. 2002).

App. 17a (parallel citations omitted). The state does not argue that this panel somehow got this standard wrong; rather, it claims that despite reciting it, the Sixth Circuit failed to apply this standard.

A review of the opinion concerning ineffective assistance of counsel belies the state's claim. When it turned to the claim of ineffective assistance of counsel, the Sixth Circuit first noted that the "[t]he state courts evaluated and decided this claim on the merits." App. 39a (citing state court decision). The Sixth Circuit then analyzed both whether counsel's performance had been deficient and, having found deficient performance, whether it resulted in prejudice to Respondent Richey. At the conclusion of each section, the Sixth Circuit explicitly concluded that "[t]he state court's conclusion to the contrary was unreasonable." *See* App. 45a; App. 61a.[6] There is simply no support in the actual text of the decision from the Sixth Circuit to support the assertion that the Sixth Circuit failed to apply appropriate deference.

This case is thus unlike *Price v. Vincent*, 538 U.S. 634 (2003), relied upon by the state. In *Price*, the court of appeals recited the appropriate standard but then explicitly refused to apply it. "Although the Court of Appeals recited this standard, it proceeded to evaluate respondent's claim *de novo* rather than through the lens of § 2254(d), apparently because it 'agree[d] with the district court that whether the state trial judge acquitted [respondent] of first-degree murder is a question of law and not one of fact." *Id.* at 639 (citations omitted). Here, unlike in *Price*, the Sixth Circuit explicitly gave deference to the state court decision.

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[6] Even though the panel reiterated that its conclusion was reached by deferring to the state court decision in denying the state's petition for rehearing, *see* App. 61a (instructing the addition of a sentence to the conclusion of the prejudice section), the state in its Appendix has failed to include the appropriate language. *See* App. 49a.

The lengths to which the state will go to convince this Court to the contrary are demonstrated by the state's repeated misrepresentations of the record in this case. In support of its reading of the Sixth Circuit's decision, the state argues that the dissent "noted that, in undertaking a de novo *Strickland* analysis, the majority exceeded the federal court's proper role under AEDPA." Pet. Cert. 13. That would come as a surprise to the dissenting judge, who actually wrote that "[t]he majority correctly states the scope of review under AEDPA." App. at 52a. Like the panel, the dissent noted that "we must decide whether [the state court's] application of the *Strickland* 'standard was 'objectively unreasonable.'" *Id.* at 54a. While the dissent disagreed with the final conclusion of the panel, Judge Siler did not disagree with the standards applied or the analysis conducted.[7]

The deference offered by the Sixth Circuit to the state court's decision may not even be necessary. In *Holland v. Jackson*, 124 S. Ct. 2736 (2004), this Court assumed that *de novo* review of a claim of ineffective assistance of counsel was appropriate where new evidence is considered in the federal habeas action. *Id.* at 2738 (citing *Monroe v. Angelone*, 323 F.3d 286, 297-99 & n.19 (4th Cir. 2003)). Thus, although the federal courts did give deference to the state court decision, that deference may not even have been necessary in the instant case.

In requesting that this Court grant the petition for a writ of certiorari to review the Sixth Circuit's conclusion that Richey received ineffective assistance of counsel, the State never discusses the Court's actual decision. The state never even argues that Richey's counsel was constitutionally

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[7] Similarly, when the state presented this same argument to the Sixth Circuit in seeking rehearing en banc, not a single judge of that court even requested a vote on the en banc request. *See* App. 60a-61a.

effective or tries to explain why counsel's failures were not prejudicial. Rather, the state only attacks the Sixth Circuit's decision as not giving the necessary deference to the state court. But as even the dissent acknowledged, the panel's decision deferred to the state court decision. The petition for a writ of certiorari on this ground should be denied.

III. The State Has Waived Any Argument Concerning the Propriety of Considering Evidence Not Presented to the State Courts By Not Making the Argument Below.

In a final maneuver to get this Court to review the decision of the Sixth Circuit, the state now argues (for the first time) that the courts below improperly relied upon evidence not presented during the state court proceedings. Relying upon this Court's decision in *Holland v. Jackson*, the state sets out a bright line rule that "a federal court cannot rely on facts not presented to the state court as a basis for determining that the state court acted unreasonably." Pet. Cert. 25. But the state never presented this argument to the courts below. To the contrary, the state repeatedly relied upon evidence discovered during the federal habeas proceeding in arguing that Respondent's habeas petition should be denied. Now, having lost in the court below, the state reverses direction and accuses the Sixth Circuit of committing error for relying upon the very evidence the state itself presented. But even if the argument were not waived (and it plainly is), the state is wrong. This Court's precedent allows the presentation of facts to the federal courts that were not presented to the state courts in circumstances such as those present here.

The state has waived any argument that the federal courts could not rely on evidence not presented to the state courts. Before the Sixth Circuit, the state repeatedly relied upon "facts that had not been before the state court, but had instead been developed for the first time in federal habeas." Pet. Cert. 24. In arguing that Richey's counsel had not been ineffective

in working with the "expert" he retained, the state relied upon no fewer than three separate depositions taken as part of discovery in the federal habeas action. Two of those depositions, of Richey's trial counsel and Dr. Armstrong, *were taken by the state*. In responding to claims not addressed by the Sixth Circuit (because they had already determined the petition should be granted in full), the state relied upon even more evidence obtained during discovery in the federal habeas action. For example, concerning ineffective assistance of trial counsel for conduct other than that discussed by the Sixth Circuit, the state relied upon three more depositions (Gregory Donohue, Richey's second trial counsel; Mary Margaret Villearreal, a witness from trial who later recanted her testimony; and Hope (Collins) Sterling, the mother of Cynthia Collins). Again, two of these three depositions (Donohue and Villearreal) were *taken by the state*. And in responding to Respondent's claim of actual innocence, the state relied upon no fewer than five depositions from the federal habeas action before the Sixth Circuit. Despite these repeated discussions of "new evidence" not presented to the state courts, the state never argued below that such evidence could not be considered.[8] To the contrary, the state repeatedly relied upon such evidence to support its positions.

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[8] The federal district court went even further and conducted its own research on scientific and technical matters, and then cited the results of that research in the decision, despite refusing Richey's request for an evidentiary hearing. *See* App. 121a (citing article by Tony Café). The author of that article submitted an affidavit before the Sixth Circuit, in which he explained "that the district court 'miscited and misunderstood my published articles' and that 'most of the world's leading forensic scientists in this field would be horrified if they saw the chromatograms used to convict Kenny Richey.'" *See* App. 16a. Before the Sixth Circuit, the state argued that the district court did not err in relying even upon its own technical research.

Having lost in the Court below after relying extensively on evidence not presented to the state courts, the state cannot now be heard to argue that the courts below erred in relying on such evidence. This Court will not address questions not raised in the courts below. *See, e.g., Pennsylvania Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 212-13 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *United States v. Ortiz*, 422 U.S. 891, 898 (1975) ("Examination of the Government's brief in the Ninth Circuit indicates that it did not raise this question below. . . . We therefore decline to consider this issue, which was raised for the first time in the petition for certiorari."); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Duignan v. United States*, 274 U.S. 195, 200 (1927) ("This Court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed."). The reason for such a refusal is demonstrated by the state's argument here. The state argues that Richey "makes no effort to show . . . that these facts were unavailable at the time of the state court proceedings." Pet. Cert. 26. But the state can only make this argument now because it failed to challenge this evidence below. As the state conceded the evidence was properly considered by the federal courts, Richey did not need to argue that the evidence could be considered.

Furthermore, even if the argument was not waived, the federal courts properly relied upon the new evidence in this case. Before the state courts, Respondent filed a Petition to Vacate or Set Aside Sentence, as required by Ohio procedure. Attached to that petition were the affidavits of two technical experts, Professor L.P. Custer and Dr. Andrew Armstrong. Custer and Armstrong, nationally recognized experts in fire

reconstruction and forensic chemistry respectively, both opined that based upon a review of the record, no scientifically valid evidence supported the state's conclusion that the fire at issue was the result of arson. To further support this claim, Richey requested that the state court allow him to take discovery and hear testimony in an evidentiary hearing. The state court denied these requests and granted the state's motion for summary judgment without a hearing. As this Court plainly explained in *Williams v. Taylor*, 529 U.S. 420 (2000), a habeas petitioner "fail[s] to develop the factual basis of a claim" when he bears some fault and responsibility for the failure to develop the record. *Id.* at 430-32 ("In this sense, a person is not at fault when his diligent efforts to perform an act are thwarted, for example, by the conduct of another or by happenstance. . . . We conclude Congress used the word 'failed' in the sense just described."); *see also Holland v. Jackson*, 124 S. Ct. 2736, 2738 (2004) (acknowledging that new evidence can be considered in federal habeas action "if respondent was not at fault in failing to develop that evidence in state court"). A habeas petitioner is diligent, and thus not at fault, when he seeks an evidentiary hearing, or other investigatory resources, from the state court, even if that court denies the request. *Williams*, 529 U.S. at 437, 442-43 (holding petitioner was diligent because he requested money to hire an investigator, even though state supreme court denied request) ("Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law.").[9] Here, Richey made every reasonable effort to

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[9] This Court previously has acknowledged that requesting an evidentiary hearing in state court was sufficient to demonstrate due diligence. *See Williams v. Taylor*, 529 U.S. 420, 432 (2000) (citing *Miller v. Champion*, 161 F.3d 1249, 1253 (10th Cir. 1998)).

develop this record in the state court; the state courts denied his requests. The federal court properly relied upon this new evidence.[10]

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[10] The state also argues that "at least some of those 'facts' [relied upon by the Sixth Circuit] were simply wrong." Pet. Cert. 26. While a review of the entire factual record as set forth during the habeas proceedings is unnecessary here, the state once again misstates the record. The one example provided by the state was that Mr. DuBois knew the carpet had been taken to the garbage dump. Pet. Cert. 25-26. But the Sixth Circuit repeatedly discussed the deposition testimony of Mr. DuBois and explicitly noted that DuBois testified, "I don't think [that counsel] told me the entire sequence of events involving the carpeting after the fire and before trial." App. 9a; *see also* App. 42a (noting that "DuBois does not remember precisely what trial counsel told him"). The state's selective quotation of testimony, out of context and without regard to the analysis actually conducted by the Sixth Circuit, does not support granting the petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 05-101

In The Supreme Court Of The United States

MARGARET BRADSHAW, Warden,
Petitioner,

v.

KENNETH T. RICHEY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Despite Richey's suggestion to the contrary, this case is *not* about "the Court of Appeals' interpretation of a defunct version of an Ohio statute." Richey Opp. Br. ("Opp.") at 1. Rather, this case presents foundational questions as to the scope of the federal courts' authority under AEDPA to undo state criminal convictions. The decision below dramatically—and improperly—undercuts the finality of state criminal convictions in two distinct ways.

First, the Sixth Circuit exercised a power that no other federal court has ever claimed—the power to overrule a state supreme court's determination as to the elements of a state law crime. The Ohio Supreme Court said (in Richey's own case) that transferred intent *does* apply to Richey's crime; the Sixth Circuit said it *does not*. Richey, recognizing that federal habeas courts can't re-decide state law issues, now desperately claims that "the Ohio Supreme Court did not decide the transferred intent issue in Richey's direct appeal." *Id.* at 15. The Ohio Supreme Court's express language, though, refutes that claim:

> The fact that the intended victim escaped harm, and that an innocent child, Cynthia Collins, was killed instead, does not alter Richey's legal and moral responsibility. The doctrine of transferred intent is firmly rooted in Ohio law.

App. 250a (quotation marks omitted). In short, the Ohio Supreme Court *did* answer the question, and the Sixth Circuit lacked the authority to reject that answer.

Second, Richey has failed to rehabilitate the Sixth Circuit's decision on his ineffective assistance claim. Richey first argues that the Sixth Circuit did, in fact, give appropriate deference to the state court decision, see Opp. at 10–14, but he fails to substantiate that claim. Every aspect of the panel's analysis, save one, reads like de novo review. And the only

exception—a few passing references that "the state court's decision to the contrary was unreasonable"—is not enough to change that conclusion. Perhaps recognizing that, Richey also tries a bolder tactic, claiming that deference "may not even be necessary." *Id.* at 23. That claim, however, further demonstrates the need for review as it cannot be squared with AEDPA's language, confirmed by the Court's cases, commanding deference to state court decisions.

In short, Richey's opposition confirms that the Sixth Circuit overstepped its bounds, creating a clear conflict with the Court's precedent and the uniform understanding among the circuits. Given the tens of thousands of habeas petitions filed every year, that conflict urgently calls for review.

A. The Sixth Circuit disturbed the fundamental balance of power between federal and state courts.

By substituting its own view of state law for that of the state supreme court, the Sixth Circuit undermined the finality of *all* state criminal convictions, regardless of the specific crime at issue. Richey thus misses the point entirely when he argues that the specific statutory language underlying Richey's conviction is "long-since amended" and now "defunct," Opp. at 1, 3, 12, and when he characterizes the Sixth Circuit's impermissible analysis as "highly fact specific," *id.* at 1. The particular criminal statute and the facts of Richey's crime are wholly irrelevant to the real issue here—namely the Sixth Circuit's willingness to embark on a de novo interpretation of state law, an analysis it conducted in the face of a clear and specific Ohio Supreme Court interpretation of the same law made earlier in the same case under review. Neither the specific facts of his case nor later changes to Ohio law can undo the damage the decision below inflicts on the federal habeas process itself.

B. The Ohio Supreme Court decided that transferred intent applied, leaving no room for the Sixth Circuit to decide otherwise.

Despite Richey's claims to the contrary, the Ohio Supreme Court *did* decide the transferred intent issue. During Richey's direct appeal, the Ohio Supreme Court, fully aware that Richey was convicted of aggravated felony murder under Ohio Revised Code ("O.R.C.") § 2903.01(B), unequivocally stated that "the fact that the intended victim escaped harm, and that an innocent child, Cynthia Collins, was killed instead, does not alter *Richey's* legal and moral responsibility." App. 250a (emphasis added). And the Ohio Supreme Court did not stop there. It bolstered this statement by citing its own cases establishing that "[t]he doctrine of transferred intent is firmly rooted in Ohio law," *id.* (citing *State v. Sowell*, 39 Ohio St. 3d 322 (1988)), by looking to decisions from other states, and by discussing the historic justification for the transferred intent doctrine. See *id.* at 251a (citing *Wareham v. State*, 25 Ohio St. 607 (1874)).

In fact, the state court's analysis of transferred intent comprises the bulk of its discussion regarding Richey's sufficiency-of-the-evidence claim. The discussion of that claim consists of eleven paragraphs, nine of which have substantive analysis. See App. 248a–51a. Of those nine, four are devoted solely to the issue of Richey's intent, and three of those four are devoted solely to *transferred* intent. See *id.* at 250a–51a. No other issue in this section commands more than a single paragraph.

Nonetheless, Richey now maintains that "the Ohio Supreme Court did not decide that transferred intent is a permissible theory of aggravated felony murder," thus leaving the Sixth Circuit free, in Richey's view, to embark on its own analysis. Opp. at 15. Even though the Ohio Supreme Court directed its comments "to *Richey's* legal and moral responsibility," App. 250a (emphasis added), Richey now argues that the court's remarks were really limited to murder under O.R.C. § 2903.01(A) (murder by prior calculation or design)—a crime that Richey was neither charged with nor convicted of—rather than murder under O.R.C. § 2903.01(B)

(felony murder)—the crime of which Richey was convicted. But Richey fails to provide *any* reason why the state supreme court would analyze a crime Richey was *not* charged with, rather than addressing the actual crime at issue in his case. And the Ohio Supreme Court's opinion certainly gives no indication that the court was doing so.

Next, Richey suggests that the Ohio Supreme Court could not have decided the issue because Richey did not raise it. Opp. at 15. But regardless of whether Richey raised it or not, the Ohio Supreme Court was free to reach the issue *sua sponte*. All that matters is that the court did, in fact, reach the issue. And the Sixth Circuit, in rejecting Ohio's procedural default argument, specifically noted that "it is clear that the Ohio Supreme Court considered the issue of transferred intent generally with regards to Richey's case." App. 32a. In essence, Richey, not unlike the court below, is trying to have it both ways—arguing in order to avoid procedural default that the state court *did* reach the issue, while at the same time insisting that the state court *did not*, so that the federal court was free to consider the issue de novo. In short, the state court decided the issue, and that state law decision is binding on federal courts in habeas.

Nor can Richey take refuge in the Ohio high court's decision not to answer the Sixth Circuit's certified question on transferred intent. Opp. at 9. If the state court's silence means anything, it is more likely that the state court recognized that its earlier holding *in Richey's own case* already resolved the matter. It would be strange indeed to presume that a state high court's silence as to a certified question shows that the court never has opined on an issue. Having stated its view once, a state supreme court should not be required to say "we really meant it" in response to a certified question in order for its ruling to be effective.

Finally, despite his attempt, Richey cannot reconcile the decision below with the Second Circuit's approach in *Davis*

v. Strack, 270 F.3d 111 (2d Cir. 2001). True, the Second Circuit granted habeas corpus relief after finding a violation of New York state law grievous enough to also offend the Due Process Clause. But the similarity between *Davis* and this case stops there. The Second Circuit accepted without pause the New York Court of Appeals' determination of how the justification defense to homicide worked under New York law. *Id.* at 125–26. It simply determined that under the law *as articulated by the New York high court*, the trial court had required too much of the defendant when it disallowed a certain jury instruction the defendant had requested. *Id.* at 126–28. Thus, unlike the court here, the Second Circuit wholly deferred to the New York high court on the state law question. Indeed, the Second Circuit repeatedly ensured that it was not rewriting New York law. *See id.* at 123 ("'[I]t is not the province of a federal habeas court to reexamine state-court determinations of state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.'") (quoting *Estelle v. McGuire*, 502 U.S. 62 (1991)); *id.* at 124 n.4 ("[O]ur role here is not to interpret New York's law of justification, but to determine whether the evidence was sufficient to warrant a justification charge under that law."). By contrast, the Sixth Circuit determined, in direct contravention of the Ohio Supreme Court's in-depth analysis of transferred intent, that how transferred intent applied to Richey's crime was an open question. And it then started from scratch in deciding Ohio law. That goes far beyond both *Davis* and the framework AEDPA demands.

C. The Sixth Circuit's "novel interpretation" reasoning is not an alternative holding.

The petition discussed how the Sixth Circuit attempted to bolster its reinterpretation of Ohio law with the argument that, if the state supreme court had allowed transferred intent for felony murder, that would have amounted to a "novel interpretation" in violation of the Due Process Clause. See

Pet. at 19–21. Richey responds by asserting that this "alternative analysis" (as he originally labels it, Opp. at 19) is really an "alternative holding" (as he later calls it, *id.* at 20), or, in other words, that the Sixth Circuit actually *accepted* the Ohio Supreme Court's view on transferred intent, but found that this interpretation violated the Due Process Clause.

As Richey's evolving labels suggest, however, the due process discussion was *not* an alternative holding. Instead, as the opinion's language clearly shows, the Sixth Circuit relied on the "novel interpretation" due process theory only as support for its claim that the Ohio Supreme Court did not, in fact, reach the transferred intent issue. See App. 30a ("[T]he Ohio Supreme Court *would have* raised a federal constitutional concern of impermissible retroactivity, *had it* authoritatively read transferred intent into" the statute.) (emphasis added).

Moreover, as the petition shows, even if the Sixth Circuit's analysis in this regard could be construed as an "alternative holding," it too would merit reversal. Pet. at 19–20. Richey's only response is one sentence, without authority, that "[s]urely a new or retroactive interpretation can violate legitimate expectations created by statutory language and persuasive case law." Opp. at 20. While that may be correct as an abstract due process principle, Richey has not even attempted to show, nor could he, that the Ohio Supreme Court's recognition of transferred intent here—a recognition consistent with over 100 years of Ohio criminal law—somehow violates that principle.

D. Richey fails to rehabilitate the Sixth Circuit's abrogation of the AEDPA standard in its review of his ineffective-assistance-of-counsel claim.

The petition showed that the Sixth Circuit essentially ignored ADEPA's standard of review and instead reviewed Richey's ineffective-assistance claim de novo. See Pet. at 21–27. Indeed, apart from the conclusory (and initially

omitted) statement that "[t]he state court's conclusion to the contrary was unreasonable," App. 61a, the Sixth Circuit's analysis is identical to what a federal court would do on direct review—a far cry from what AEDPA commands. And Richey's opposition provides no reason to believe that the court below actually engaged in the "unreasonable application" analysis that AEDPA, and this Court's precedents, require.

Richey does not—because he cannot—identify any "analysis" from the Sixth Circuit that indicates how or why the state court's *Strickland* application was "objectively unreasonable." Richey's own words tell the story. He describes the lower court's *Strickland* analysis like this: "The Sixth Circuit then analyzed both whether counsel's performance had been deficient and, having found deficient performance, whether it resulted in prejudice to Respondent Richey." Opp. at 22. That is, of course, the traditional *Strickland* analysis *on direct review*. At this point in his brief, then, because Richey insists that the Sixth Circuit made the full AEDPA analysis, one would expect him to seize the opportunity and explain at length the Sixth Circuit's "unreasonable application" analysis. But he does not do so because that analysis does not exist. Instead, Richey's very next sentence parrots the Sixth Circuit's belated conclusion that "the state court's conclusion to the contrary was unreasonable." *Id.* (quotation marks omitted). In other words, given the opportunity to rebut our primary argument that the Sixth Circuit failed to conduct an "unreasonable application" analysis, Richey offers silence.

Bell v. Cone—a case that Richey never cites, much less distinguishes—provides the better analysis and shows why Richey is wrong on his view of the Sixth Circuit's decision. 535 U.S. 685 (2002). Indeed, the Sixth Circuit's decision in *Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001), (which the Court later reversed) has an AEDPA analysis with all the features that Richey praises in the circuit's decision here. In *Cone v.*

Bell, the Sixth Circuit recited the AEDPA standard, *id.* at 967–68, cited the state court opinions, *id.* at 976, conducted an "analysis," *id.* at 976–79, and concluded that the state court decision was "unreasonable," *id.*

None of this, however, saved *Cone v. Bell* from reversal for the same reason that requires reversal here: The lower court in *Bell* failed to give appropriate deference to the state court decision. As the Court said in *Bell*, a petitioner must do more than "convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly." 535 U.S. at 699. The *Bell* petitioner failed to do so, and that is also true here. But instead of tackling *Bell v. Cone* head-on, Richey dodges it with silence. Indeed, the only case he even attempts to distinguish, *Price v. Vincent*, 538 U.S. 634 (2004), see Opp. at 22, is one selectively plucked from a string citation in Ohio's petition.

With nothing substantive left to say on the point, Richey resorts to attacking Ohio for "repeated misrepresentations of the record in this case." Opp. at 23. But Ohio's discussion of the dissenting opinion below is no "misrepresentation." Judge Siler in dissent relied on the Court's *Bell* decision in emphasizing that habeas petitioners must do more than show that they have a *Strickland* claim—they must also establish that the state court's decision to the contrary was unreasonable. App. 58a. Judge Siler showed that Richey could not meet this standard, and the reasonable inference is that he believed the majority applied a different one in granting Richey relief.

Nor is Richey correct in faulting Ohio for not including the belated phrase "the state court's conclusion to the contrary was unreasonable" in the Appendix opinion. Opp. at 22 n.6. According to the Sixth Circuit docket, the panel never issued an amended opinion in Richey's case. To be sure, some three months after issuing its opinion, the panel entered a separate order stating that it "had added" the "unreasonable